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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
Deployment of Wireline Services Offering)
Advanced Telecommunications Capability)

CC Docket No. 98-147

Comments of
McLeodUSA TELECOMMUNICATIONS SERVICES, INC.

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SUMMARY

In this proceeding, the Commission has the opportunity to help promote innovation and investment by all participants in the telecommunications marketplace, both incumbents and new entrants, and stimulate competition for all services, especially advanced services. McLeodUSA urges the Commission to adopt proposals to ensure that incumbent LECs provide advanced services in a fair and competitive manner and that barriers to entry to the local market are removed. By doing so the Commission will encourage deployment of advanced services and stimulate competition in the local exchange market.

Incumbent local exchange carriers should not be allowed to provide advanced services through a separate affiliate not subject to the competitive obligations of section 251(c). As described in the Commission's proposal, the advanced services affiliate would not be truly separate but would be an "assign" of the parent incumbent LEC and should therefore be subject to the same competitive obligations. McLeodUSA recommends that the Commission decline to adopt its proposal to allow incumbent LECs to provide advanced services through a "separate" affiliate or, if the proposal is adopted, impose strict safeguards to prevent advanced services affiliates from gaining an unfair competitive advantage by exploiting their relationship with the incumbent LEC.

McLeodUSA agrees with the Commission's conclusion that incumbent LECs must resell, at wholesale rates, advanced services generally marketed by incumbent LECs to residential or business users or Internet service providers. If a service is in fact generally offered at retail to subscribers who are not telecommunications carriers, it must be offered for resale at a wholesale discount, regardless of whether it is an "access" service or not. By ensuring that advanced services

are offered for resale at wholesale rates, the Commission will encourage the deployment of advanced services and facilitate swift entry into the market by national and regional resellers, including small entities that may not be able to provide competitive advanced services without a discounted rate.

McLeodUSA urges the Commission to adopt national rules concerning collocation and local loop unbundling. The Commission should ensure that new entrants have the opportunity to collocate equipment on an incumbent LEC's premises for interconnection and are given access to unbundled network elements, such as loops. National rules are necessary to prevent incumbent LECs from thwarting local competition and will encourage the deployment of advanced services by increasing predictability and certainty, as well as by easing the entry of competitive LECs providing advanced services in multiple states.

Finally, McLeodUSA urges the Commission to reject proposals to modify LATA boundaries to allow BOCs to provide interLATA service. The proposals involve more than minor modifications to particular LATA boundaries; rather, they would allow widespread BOC participation in providing interLATA service. Because this would diminish the incentives of the BOCs to open up local exchange markets to competition, McLeodUSA urges the Commission not to adopt these proposals.

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McLeodUSA TELECOMMUNICATIONS SERVICES, INC.**

McLeodUSA Telecommunications Services, Inc. ("McLeodUSA"), by undersigned counsel, respectfully submits its comments pursuant to the Notice of Proposed Rulemaking in the above captioned proceeding.¹

McLeodUSA, through its operating subsidiaries, is a provider of integrated telecommunications services to residential customers and small and medium sized businesses in Colorado, Iowa, Illinois, Indiana, Minnesota, Missouri, North Dakota, South Dakota, Wisconsin and Wyoming. McLeodUSA offers "one-stop" integrated telecommunications services, including local, long distance, voice mail, paging and Internet access services, tailored to the customer's specific needs. McLeodUSA is currently constructing fiber optic networks in five states to carry telecommunications service traffic on its own network.

¹ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Notice of Proposed Rulemaking, CC Docket No. 98-147, FCC 98-188, released Aug. 7, 1998 ("NPRM").

I. INCUMBENT LOCAL EXCHANGE CARRIERS SHOULD NOT BE ALLOWED TO PROVIDE ADVANCED SERVICES THROUGH A SEPARATE AFFILIATE NOT SUBJECT TO THE COMPETITIVE OBLIGATIONS OF SECTION 251(c).

A. The Advanced Services Affiliate Would Not Be Truly Separate But Would be an "Assign" of the Parent Incumbent Local Exchange Carrier.

The competitive obligations imposed upon incumbent local exchange carriers ("LECs") are extended to their "successors or assigns" under section 251(h) of the Telecommunications Act of 1996 ("1996 Act").² An "assign" is defined for legal purposes as a party who has received an assignment of property or contract rights³ or an entity "to whom property is, or will, or may be assigned."⁴ Thus, strictly interpreted, an assign is an entity who has received any assignment of property, benefits, or obligations. To the extent the Commission's proposal allows incumbent LECs to transfer assets, beyond initial start up capital, to affiliates providing advanced services, those affiliates would be deemed assigns of the incumbent LECs and subject to the competitive obligations of section 251(c).⁵

Even assuming, for the sake of argument, that an incumbent LEC could transfer some property or benefits to its advanced services affiliate without that affiliate being considered an assign, the large scale transfer of assets permitted by the Commission in the *NPRM* clearly marks the "separate" advanced services affiliate as an assign of its parent incumbent LEC. Although the

² 47 U.S.C. § 251(h) (1996).

³ *Restatement of Contracts Second*, Sec. 323, Comment b.

⁴ BLACK'S LAW DICTIONARY (6th ed. 1990).

⁵ 47 U.S.C. § 251(c) (1996).

Commission does impose some restrictions on the transfers from incumbent LECs to their advanced services affiliates, such as the restrictions on transferring local loops⁶ or selling or conveying real estate,⁷ incumbent LECs are afforded considerable leeway in transferring significant assets and benefits to their advanced services affiliates. Under the misnamed *de minimis* exception, incumbent LECs could potentially transfer to their advanced services affiliates nearly all equipment necessary to provide advanced services, including, for example, Digital Subscriber Line Multiplexers (DSLAMs), packet switches and transport facilities.⁸ The affiliates may also receive transfers of materials used for trial purposes⁹ and may be able to leave any or all of the "transferred" equipment in place.¹⁰ Under the Commission's proposal, advanced services affiliates may even be able to receive transfers of non-equipment assets, such as brand names, employees, customer accounts, and customer proprietary network information, from their parent incumbent LECs.

Any "separate" advanced services affiliate that receives an assignment of such significant assets from its parent incumbent LEC would plainly fall into the category of an "assign" of that LEC and as such would be subject to the same competitive obligations. To allow incumbent LECs to provide advanced services through their assigns, free of the competitive obligations of section

⁶ *NPRM* at ¶ 107.

⁷ *Id.*

⁸ *Id.* at ¶ 108.

⁹ *Id.* at ¶ 112.

¹⁰ *Id.* at ¶ 110.

251(c), would be unlawful and contravene the procompetitive purposes of the 1996 Act. McLeodUSA urges the Commission to ensure that incumbent LECs provide advanced services in a fair and competitive manner by declining to adopt the proposal in the *NPRM* to allow incumbent LECs to provide advanced services through a "separate" affiliate. If the Commission does adopt some form of its "separate" affiliate proposal, McLeodUSA suggests that it should preclude any transfer of property or benefits from incumbent LECs to their advanced services affiliates.

B. Safeguards are Necessary to Prevent Advanced Services Affiliates From Gaining an Unfair Competitive Advantage by Exploiting Their Relationship with the Incumbent Local Exchange Carrier.

Although the structural separations¹¹ the Commission has suggested are a vital part of any proposal to allow incumbent LECs to provide advanced services free from the competitive obligations of section 251(c), they are not sufficient to prevent advanced service affiliates from exploiting their relationship with the incumbent LEC to gain an unfair competitive advantage. Incumbent LECs will have the incentive and ability to discriminate in favor of their advanced services affiliates, no matter what the formal separation requirements may be. Therefore, McLeodUSA urges the Commission, if it decides to implement some form of its proposal allowing incumbent LECs to provide advanced services through a separate affiliate free from the obligations of section 251, to impose strict safeguards on interaction and transactions between the incumbent LECs and their advanced services affiliates.

¹¹ *Id.* at ¶ 92.

An advanced services affiliate's relationship with its parent incumbent LEC already gives it a strong advantage over competitive providers. The Commission should take steps to ensure that this advantage is minimized as much as possible. An advanced services affiliate should be forbidden from using the brand name of its parent incumbent LEC (or any variation thereof) and the Commission should prohibit joint billing and marketing of services by the incumbent LEC and its affiliate. By sharing the incumbent LEC's brand name and jointly billing for voice traffic and advanced services the affiliate will make itself more attractive to consumers who already use the incumbent LEC for their local service and are interested in signing up for advanced services as part of a single package sold by one telephone company. Similarly, joint marketing will confer an unfair advantage on the affiliate because, despite any safeguards imposed by the Commission, consumers inevitably will regard it as part of the same company as their incumbent LEC.

Moreover, the Commission should not bestow additional benefits upon advanced services affiliates by exempting incumbent LECs from nondiscrimination requirements regarding the transfer of equipment.¹² The Commission should require incumbent LECs to offer any equipment available for transfers to all competitive LECs on a nondiscriminatory basis, not just to the LEC's advanced services affiliate. If the Commission persists in allowing these plainly discriminatory transfers of equipment, the transfers should be limited to equipment installed before the release of the *NPRM* and be permitted only for a short period immediately following the establishment of the advanced services affiliate as a legally separate entity. In addition, if an incumbent LEC "transfers" equipment

¹² *Id.* at ¶ 111.

to its advanced services affiliate and permits the affiliate to leave the equipment in place, the Commission should require that independent carriers also be given the chance to place equivalent equipment in the central office.

These safeguards are necessary to ensure the competitive advantage enjoyed by advanced service providers affiliated with incumbent LECs is not compounded. Because any provision of advanced services through incumbent LEC affiliates that are not subject to the competitive obligations of section 251(c) involves significant risk of undermining the pro-competitive policies of the 1996 Act, McLeodUSA urges the Commission not to sunset these safeguards. If the Commission insists on a sunset provision for these safeguards, McLeodUSA suggests that, at the earliest, they remain in place until the incumbent LEC is declared non-dominant. Any earlier sunset date will provide the incumbent LEC with an increased opportunity to harm competition by favoring its advanced services affiliate and discriminating against its competitors.

II. ADVANCED SERVICES MUST BE OFFERED FOR RESALE AT WHOLESALE RATES.

Making services available at wholesale rates for resale is a valuable tool for encouraging deployment of advanced services and introducing competition into the local market. Section 251(c)(4) provides for resale of "any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers."¹³ Advanced services will most likely be

¹³ 47 U.S.C. § 251(c)(4) (1996).

predominantly offered to residential or business users or Internet providers, none of whom are telecommunications carriers. McLeodUSA agrees with the Commission's conclusion that incumbent LECs must resell at wholesale rates, pursuant to section 251(c)(4), advanced services marketed by incumbent LECs generally to residential or business users or Internet service providers, without regard to their classification as telephone exchange service or exchange access.¹⁴

The exchange access classification was used in the Commission's *Local Competition Order*¹⁵ as a way of *identifying* services offered to end users. The purpose of this classification was to implement the "provides at retail" standard of § 251(c)(4), not to supplant it. In the *Local Competition Order*, the Commission concluded that certain services were not subject to section 251(c)(4) because the vast majority of purchasers were telecommunications carriers, *not* because they were exchange access services.¹⁶ If a service is in fact generally offered at retail to subscribers who are not telecommunications carriers, then it must be offered for resale at a wholesale discount, regardless of whether it is an "access" service or not.

The wholesale pricing requirement of section 251(c)(4) is intended to facilitate competition on a resale basis.¹⁷ Resale is the quickest method for introducing competition into the local exchange

¹⁴ NPRM at ¶ 189.

¹⁵ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, 11 FCC Rcd 15499, 15934, (released August 8, 1996) ("*Local Competition Order*").

¹⁶ *Id.*

¹⁷ *Id.* at 15955.

market and a wholesale discount is necessary to allow resellers to provide competitive rates and services. Resale can be an important entry strategy for competitive service providers, particularly while they build their own facilities, and encourages entry by small businesses that may lack the capital to enter the local exchange market by purchasing unbundled elements or constructing their own facilities. By ensuring that advanced services are offered for resale at wholesale rates, the Commission will encourage the deployment of advanced services and facilitate swift entry into the market by national and regional resellers, including small entities that may not be able to provide competitive advanced services without a discounted rate.

III. INCUMBENT LOCAL EXCHANGE CARRIERS SHOULD BE PREVENTED BY NATIONAL RULES ON COLLOCATION AND LOCAL LOOPS FROM THWARTING LOCAL COMPETITION.

McLeodUSA supports the Commission's proposal to establish national collocation¹⁸ and local loop¹⁹ standards pursuant to sections 201 and 251 of the 1996 Act.²⁰ National standards are necessary to prevent incumbent LECs from thwarting local competition and will encourage the deployment of advanced services by increasing predictability and certainty, as well as easing the entry of competitive LECs providing advanced services in multiple states. The Commission should adopt national standards as *minimum* requirements for incumbent LECs and ensure that states have

¹⁸ *NPRM* at ¶ 123.

¹⁹ *Id.* at ¶ 154.

²⁰ 47 U.S.C. §§ 201, 251 (1996).

the ability to adopt additional requirements to address state-specific issues and further encourage competition.

The national collocation standards should prevent incumbent LECs from imposing unnecessary restrictions on the type of equipment competitive LECs may collocate, thereby impeding competitive LECs' deployment of local exchange and advanced services. McLeodUSA urges the Commission to require incumbent LECs to allow collocation by competitive LECs of virtually *any* kind of telecommunications equipment used for voice and data transmission, including equipment with switching capabilities, DSLAMs and remote access management equipment. In addition, McLeodUSA endorses the Commission's proposal to encourage collocation by requiring incumbent LECs to offer collocation arrangements that reduce the space needed by each provider and to provide competitive LECs with information regarding space availability.²¹ These proposals will aid competitive LECs in combating anticompetitive behavior and should not unduly burden incumbent LECs.

To facilitate the deployment of advanced services and further the competitive goals of the 1996 Act, the Commission must ensure that competitive providers have efficient and nondiscriminatory access to the local loop network. McLeodUSA suggests that the Commission adopt as a national local loop standard any unbundling option requested by a competitive LEC that any incumbent LEC provides or has been directed to provide by a state commission. Incumbent LECs should also be required to provide conditioned loops and sufficient information about loops for

²¹ *NPRM* at ¶¶ 137,146.

competitive LECs to determine independently whether the loops can support xDSL. McLeodUSA also urges the Commission to mandate that incumbent LECs provide sub-loop unbundling and collocation at remote terminals. Where a loop is provisioned by means of a digital loop carrier system or where there is insufficient space for the incumbent LEC to collocate equipment, a competitive LEC may only be able to access the loop to provide advanced services through access at a remote terminal. By extending the concept of loop unbundling to the sub-loop level the Commission will "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."²²

IV. BELL OPERATING COMPANIES SHOULD NOT BE ALLOWED TO PROVIDE INTERLATA SERVICE THROUGH BOUNDARY MODIFICATIONS.

McLeodUSA strongly objects to the Commission's proposals to modify LATA boundaries to permit Bell Operating Company ("BOC") interLATA entry prior to compliance with section 271 of the 1996 Act.²³ The Commission's proposals involve more than minor modifications to particular LATA boundaries, they would allow widespread BOC participation in providing interLATA service. Not only would these modifications diminish the incentives of the BOCs to open up local exchange markets to competition, but they would also be in plain violation of section 271 of the 1996 Act.

²² 47 U.S.C. § 706(b) (1996).

²³ 47 U.S.C. § 271 (1996); *NPRM* at ¶¶ 191-194.

In light of their anticompetitive effects, McLeodUSA urges the Commission to rethink its proposals to modify LATA boundaries to allow BOCs to provide interLATA service.

CONCLUSION

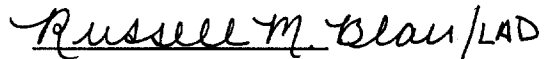
For the reasons stated above, McLeodUSA urges the Commission to ensure that incumbent LECs provide advanced services in a fair and competitive manner and that barriers to entry to the local market are removed. McLeodUSA requests that the Commission decline to adopt the separate affiliate proposal and strengthen the rules for collocation and unbundling of local loops. By doing so the Commission will help promote innovation and investment by all participants in the telecommunications marketplace, both incumbents and new entrants, and stimulate competition for all services, especially advanced services.

Respectfully submitted,

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